

No. 15,805

United States Court of Appeals  
For the Ninth Circuit

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MAGNOLIA MOTOR & LOGGING Co., a Corporation,	} <i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA,	} <i>Appellee.</i>

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CLOSING BRIEF OF APPELLANT  
MAGNOLIA MOTOR & LOGGING CO.,  
A CORPORATION.

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**CLOSING BRIEF OF APPELLANT  
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**ARGUMENT.**

**I.**

**THE INCONSISTENT VERDICTS, TOGETHER WITH THE NUMEROUS OTHER PREJUDICIAL ERRORS, COMPEL THIS COURT TO REVERSE APPELLANT'S CONVICTION.**

It has never been, nor is it now, the contention of appellant that the inconsistency between the conviction of the appellant corporation and the acquittal of the co-defendant R. Drew Lamb, standing alone, would require the verdict of conviction to be set aside. Nor does the appellant contend that the reviewing Court has before it other than a question of whether or not the conviction is consistent with the evidence.

A verdict of a jury is normally clothed with a presumption that it is correct and based on competent and substantial evidence. It is appellant's contention, however, based on the cases cited in its opening brief, that this presumption of correctness usually attributed to the verdict of a jury does not exist in the present case.

Where a jury has acquitted the sole acting officer and agent of the corporation and yet has convicted the corporation, the verdict of guilty is so inconsistent as to be illogical and irrational. Under the language of the case of *Manley v. United States*, 238 F. 2d 221, the reviewing Court must be extraordinarily careful to scrutinize the record to ascertain any prejudicial error. The record herein contains such *other prejudicial errors* as to compel this Court to reverse the verdict of guilty.

It is appellant's earnest contention that the trial Court committed errors which were prejudicial to this defendant in charging and trying the defendants for violations of Sections 18 U.S.C.A. 641 and 18 U.S.C.A. 1361 rather than Sections 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853; in admitting into evidence plaintiff's Exhibit "III" and plaintiff's Exhibit "VI"; in refusing to admit into evidence defendant's Exhibit "H"; for instructing the jury that as a matter of law the land on which the timber was located belonged to the United States at the time the alleged crime was committed; and in failing to direct the jury to return a verdict of not guilty on the ground there was a complete lack of relevant evidence from

which a jury could properly find or infer beyond a reasonable doubt a criminal intent to steal or depredate property of the United States.

When viewed in the light of all of these prejudicial errors and the fact that the verdict of the jury is stripped of any semblance of logic or reason, appellant respectfully contends that this reviewing Court must set aside and reverse the verdict of guilty. *Peveley Dairy Company v. United States*, 178 F. 2d 363, 370-371.

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## II.

**THE ONLY INTENT OF APPELLANT IS THAT OF THE DEFENDANT R. DREW LAMB WHO WAS ACQUITTED BY THE JURY.**

The Government in its brief at page 10 states, "There is no doubt that R. Drew Lamb was the principal officer and agent of the corporation." The Government then argues that, nevertheless, other employees of the corporation were actively engaged in any alleged theft and depredation and therefore the Government has sustained its burden of proof with relation to the conviction of the corporation. The case of *United States v. George F. Fish, Inc.*, 154 F. 2d 798, is cited to support this position. First, the *Fish* case is not in point in that both the salesman and the corporation were found guilty. Secondly, as shown in cases relied upon by the Court in the *Fish* case, a corporation can be held punishable because of the knowledge and intent of its agents where such

agents have been entrusted with authority to act. *New York Central and H.R.R. Company v. United States*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613; *C.I.T. Corp. v. United States*, 150 F. 2d 85.

In the *C.I.T. Corp.* case, the Court at page 89 states, "It is the function delegated to the corporation officer or agent which determines his power to engage the corporation in a criminal transaction."

Appellant contends that R. Drew Lamb was the only officer or agent who was clothed with the authority to perform the acts which the Government has claimed were illegal. The activity set forth in appellee's brief on pages 10 and 11 and again on pages 24 to 26 were ministerial acts carried out under the direction and orders of defendant Lamb. The Government's entire case as presented through its witnesses, was an effort to prove that Lamb had the necessary *mens re* and acted thereunder to steal and depredate property of the United States. It is inconceivable that the Government can now claim that Ritchie, Wallace, Colby, Ryerson, Briggs, Ainsworth, and Jameson knowingly, willfully, and deliberately performed criminal acts on behalf of the corporation contrary to the knowledge and authority of R. Drew Lamb and that their activity showed a distinct criminal intent of the corporation. The intent to be imputed to the defendant corporation must be that of the officers and agents who are authorized to make the decisions and act for the corporation, not employees or agents who are acting under the direction and authority of such officers and agents.



## III.

THE ONLY SECTIONS WHICH COVER THE ACTIVITY CHARGED AGAINST APPELLANT ARE THE SPECIFIC SECTIONS 18 U.S.C.A. 1852 OR 18 U.S.C.A. 1853.

Appellant renews its contention that the proper statutory provision under which the defendants should have been charged, if any, was either 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853. This is not based on a belief that appellant was charged with a theft or depredation of realty. The above sections clearly state that it is a crime to cut or destroy any timber growing on the public lands of the United States, to remove any timber from the public lands with intent to dispose of the same, or to unlawfully cut or injure or destroy any tree growing, standing, or being upon land of the United States. These are the specific acts under which the defendants were indicted, tried, and appellant was convicted. These were the specific crimes which Congress intended to be punished by a fine of not more than \$1,000 or imprisoned not more than one year, or both. Again, quoting the language of the Honorable James Alger Fee, Judge of the United States District Court, in the case of the *United States v. Frank J. Simpson*, U. S. District Court, District of Oregon, No. C-17903, "And where there is a specific statute which talks about cutting trees, willfully injuring trees, then I think you have to go under that statute."

When the freedom and property of a person or corporation is put in jeopardy for the commission of a crime, there is an overriding presumption of innocence. The intent of Congress to declare an activity

criminal must be clearly spelled out. In the present case we have an attempt by the Government to base a conviction on *its* determination that Congress intended it to be a far more serious crime to take logs once cut than to cut or destroy or remove timber which is growing upon public lands. Judge Halbert in *United States v. Lamb*, 150 F. Sup. 310, drew this distinction when he said: "This is particularly true when the timber has been transmuted from real property into personal property (that is, standing trees to logs or lumber)."

Appellant contends this was not the intention of Congress, and where two statutory provisions apply to the same set of facts, one applying only to the specific fact situation, and the other applying generally to all similar fact situations, the specific provisions will control the general, and in a criminal prosecution the specific provision alone will be applicable.

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#### IV.

**IT WAS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION TO CHARGE ANY APPELLANT UNDER SECTIONS 18 U.S.C.A. 641 AND 18 U.S.C.A. 1361.**

The United States Supreme Court in its recent decision in the case of *Bolling v. Sharpe*, 347 U.S. 497, reiterates the doctrine that the due process clause of the Fifth Amendment to the United States Constitution shall be determined an equal protection clause with respect to the actions of the Federal Gov-

ernment. Appellant wishes to reemphasize the language of Mr. Justice Black in his dissent in the case of *Barra v. United States*, 351 U.S. 131, as quoted in appellant's opening brief on pages 17 to 19, which language, although contained in a dissent, correctly states the law of this land. The rule of law was not overruled by the majority opinion as it was therein stated that the question of due process was not an issue of the case. This, however, does not detract from the accuracy of Mr. Justice Black's statement of law therein set forth.

There cannot be different degrees of penalty for different persons for the same criminal act. Appellee has not cited one case where either 18 U.S.C.A. 641 or 18 U.S.C.A. 1361 was used to convict for the activity allegedly done by appellant herein. It is the considered opinion of appellant that this is the first instance where these sections have been used to obtain a conviction for the cutting and removing of timber from Government land. On the other hand, appellant has cited in its opening brief a number of cases where there have been indictments and convictions under Sections 18 U.S.C.A. 1852 and 18 U.S.C.A. 1853, and similar earlier sections, the specific misdemeanor sections intended by Congress to cover the set of facts charged against appellant.

## V.

**THERE WAS NO SUBSTANTIAL OR COMPETENT EVIDENCE OF CRIMINAL INTENT, A NECESSARY ELEMENT OF THE CRIMES CHARGED.**

In appellee's brief, after setting forth a discussion of the evidence which the Government feels supports the decision of the jury, it is contended that in any event, an Appellate Court will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of the evidence, but will limit its decisions to questions of law, and as the issue of criminal intent was submitted to the jury, this reviewing Court must accept the finding of the jury. Appellant respectfully contends that this Court has the power and the duty to examine the record carefully to determine whether or not the evidence is sufficient to sustain the verdict.

As stated by the Court in *Mortenson v. United States*, 322 U.S. 369, 374, 64 S.Ct. 1037, 88 L.Ed. 1331, a reviewing Court has "never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. *Abrams v. United States*, 250 U.S. 616, 619, 40 S.Ct. 17, 18, 63 L.Ed. 1173." See also *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 254, 60 S.Ct. 811, 84 L.Ed. 1129.

In a criminal prosecution there is a legal presumption that the appellant was innocent until proved guilty beyond a reasonable doubt. Unless there is substantial evidence of facts which exclude every other

hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment against him. *Hammond v. U.S.*, 127 F. 2d 752, 753; *Isbell v. United States*, 227 F. 788, 792; *U.S. v. Silverman*, 248 F. 2d 671, 686; *Stoppelli v. United States*, 183 F. 2d 391.

Without repeating the arguments set forth in appellant's opening brief and the discussion regarding the lack of proof of intent of the corporation as set forth in Section II above, appellant firmly contends that there has been a complete lack of competent, relevant, and substantial evidence from which a jury could have found a *mens re* on the part of the appellant corporation. Further, appellant contends that the trial Court should have concluded as a matter of law that this essential element was not proved beyond a reasonable doubt.

Upon the verdict of acquittal of R. Drew Lamb, the trial Court should have directed a verdict of acquittal as to this appellant. There was no evidence of criminal intent on the part of the corporation other than that which would have proved criminal intent on the part of R. Drew Lamb. Were it not for the prejudicial errors as set forth in appellant's opening brief, and in particular the instruction to the jury determining as a legal fact that the property upon which the alleged crime was committed belonged to the United States of America, as discussed below, this

jury, as reasonable men trying the facts, would not have reached the hypothesis of guilt.

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## VI.

**IT WAS ERRONEOUS AND PREJUDICIAL FOR THE COURT TO INSTRUCT THE JURY THAT THE UNSURVEYED LAND BELONGED TO THE UNITED STATES AND THAT CRIMINAL INTENT COULD BE FOUND IF APPELLANT KNOWINGLY TOOK PROPERTY FROM ANYONE, REGARDLESS OF WHO OWNED IT.**

The appellant in its opening brief, and the Government in its reply brief, proceeded on the erroneous assumption that Instruction No. 15 as set out in both appellant's and appellee's briefs was given to the jury by the trial judge. A reading of the transcript of the proceedings subsequent to the original instructions of the Court to the jury revealed that Instruction No. 15 was not given. Rather, the Court, following an announcement from the foreman of the jury that they were hopelessly deadlocked, reinstructed the jury and gave the following instructions:

The Court. As a matter of law, this particular unsurveyed land, which did exist, belonged to the United States of America. That is a legal fact. You are not required to find legal facts, and perhaps I should have told you this before: A legal fact is a legal conclusion and the legal conclusion dictated by the facts here as to the ownership of this land is that it belonged, as part of the public domain, to the United States of America, and not only belonged to the United States of America, but belonged to it from the day when the treaty with Mexico was effected around 1850

when California became a state. That is a legal fact.

It is also true that as a matter of law the area being in the public domain could not be rented, conveyed out of Government ownership into private ownership until such a time as the land was surveyed and the survey was accepted and filed on the official record with the Bureau of Land Management of the Department of Interior or the Federal Government. When that was done, the individual sections and subdivisions of this area could then be identified for the purpose of describing townships and sections and the like, and could be incorporated into legal documents called patents or deeds, but the disposal features—the means by which the Federal Government can dispose of public land by conveying them to private individuals by way of patent—is an interesting subject, but it isn't particularly relevant to what we are here dealing with. Here basically the question for you to decide is whether or not the defendant knew or honestly believed that he or the corporation owned this particular area. He might have been mistaken and would have been mistaken if he so believed because it did in fact belong to the United States; but, if from where he stood and looked he believed honestly that it belonged to him and that he was justified in acting as he in the corporation did, then, of course, there's absent and lacking any criminal intent; and, under those circumstances, the verdict required by the law must be not guilty. On the other hand, if the defendant knew or should know from all the signs and surrounding circumstances that at least neither he nor the corporation owned this land, even though he didn't know

who owned, if he knew and it knew it didn't own the land, but nevertheless these acts were performed with the intent to deprive whoever owned the land permanently of these logs, or, if, regardless of who owned the land there was an intent to despoil this forest area, and that the defendant did these acts knowingly, willfully, deliberately, purposely, well knowing the law prohibited the doing of these acts regardless to whom this property belonged, then under those circumstances, you have present at the time of the doing of these acts the element of criminal intent, and under those circumstances, the verdict required by law is one of guilty.

Following this instruction, Mr. Wilkins, counsel for appellant, made a lengthy exception to the instructions based on his prior arguments given at the time of settling of instructions which are before this Court.

Appellant contends that this instruction was prejudicially erroneous for the reasons set forth in appellant's opening brief commencing at page 26 and concluding on page 34. The presumption of innocence to which appellant was entitled was overcome by this instruction from the Court which told the jury that the property taken was that of the United States and directed them, in effect, to return a verdict of guilty if they found that the defendants cut and removed the property.

In the first place, the Court, in effect, told the jury that it need not be concerned with such issues as the title to the land, the alleged hiatus, the Government's belief that no hiatus existed, the efforts of Lamb to



determine his rights in the alleged hiatus, the fact that the corrected survey was not filed and the boundaries created until approximately two years after the alleged crime, the limitations of the Government in unsurveyed public domain—all elements tending to prove the lack of criminal intent, and the very heart and essence of appellant's defense.

In the second place, the Court goes beyond the scope of the code sections under which the defendants were charged by instructing the jury that they could find the necessary criminal intent if appellant knowingly took property or depredated land owned by anyone other than itself. The only crimes charged are the taking or depredating of *United States* property, and the only *mens re* to be found is the intention to take or depredate *United States* property.

It is prejudicial and in grave error to instruct the jury that it can find the necessary criminal intent to convict appellant if Lamb knew or should have known that the acts performed were "with the intent to deprive whoever owned the land permanently of these logs, or if, regardless of who owned the land, there was an intent to despoil this forest area, and that the defendant did these acts knowingly, willfully, deliberately, purposely, well knowing the law prohibited the doing of these acts, regardless to whom this property belonged." It is not a crime against the United States to cut and remove logs of someone other than the United States.

Further, in giving the instruction at a time when the jury had announced it was hopelessly deadlocked,

substantially more emphasis was given to this instruction by the jury than normally would have been given, and appellant was thus deprived of a fair and impartial trial.

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**CONCLUSION.**

We respectfully renew our request that the judgment of conviction be reversed for the reasons set forth in appellant's briefs on file herein.

Dated, December 26, 1958.

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